



April 17, 2000

Ms. Laura Portwood
Senior Assistant City Attorney
City of Houston
P.O. Box 1562
Houston, Texas 77251-1562

OR2000-1536

Dear Ms. Portwood:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 134413.

The City of Houston (the "city") received a request for sixteen items of information that concern CA 1 Services, Inc. You state that you have released some of the information to the requestor. You claim that Exhibit 2, the information responsive to items 1, 2, 4-8, 10-11, 13, and 15, is excepted from disclosure under sections 552.103, 552.107, 552.110, and 552.111 of the Government Code. However, in your letter dated March 6, 2000, you state that you did not submit documents pursuant to sections 552.107 and 552.111, and you withdrew your claim to these two exceptions. Accompanying the letter dated March 6, 2000 were additional drawings that you assert are excepted from public disclosure pursuant to section 552.110 of the Government Code. You acknowledge that you waived the section 552.103 exception in relation to only these documents because the submission of these documents exceeded the fifteen-day limit for submitting documents under section 552.301(e). We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that section 552.110 of the Government Code excepts from required public disclosure two categories of information: 1) trade secrets, and 2) commercial or financial information for which it is demonstrated, based on specific factual evidence, that disclosure would cause substantial competitive harm to the person from whom the information was obtained. Section 552.305 requires a governmental body which receives a request for information, the release of which might implicate a person's proprietary interests and be subject to section 552.110 of the Government Code, to notify such person not later than the tenth business day after receiving the request. The notice provides that the person may submit to the attorney general, not later than the tenth business day after the person receives the notice, each reason the person has as to why the information should be withheld and a letter memorandum or brief in support of that reason.

The material you submitted reflects that, pursuant to section 552.305, the city notified the interested third parties of this instant request on two separate occasions, by letters dated February 29, 2000 and March 3, 2000. To date, this office has received no communication from those third parties as to why the requested information is protected from disclosure. Consequently, we have no basis for finding that the submitted drawings may be withheld under section 552.110. Therefore, these drawing must be released. However, we must still determine whether Exhibit 2 is excepted from public disclosure pursuant to section 552.103(a) of the Government Code.

Before we consider whether Exhibit 2 is excepted from public disclosure under section 552.103(a), we find that Exhibit 2 contains documents that fall within the purview of section 552.022 of the Government Code. Section 552.022 of the Government Code specifies several categories of information which are public information and may not be withheld from disclosure unless they are expressly confidential under other law. We note that section 552.103 is a discretionary exception¹ and not “other law” that makes the information confidential. We conclude Exhibit 2 contains information deemed to be public under section 552.022(a)(3) of the Government Code. Section 552.022(a)(3) states information is not excepted from public disclosure if it is

information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body.

We have marked the documents that fall within section 552.022(a)(3). These documents must be released to the requestor.

We further note that Exhibit 2 contains documents filed with the Secretary of State. We find that these documents constitute information that is within the public domain and, as such, cannot be withheld under section 552.103 of the Government Code. We have marked the documents to be released.

Next, we will consider whether the documents contained in Exhibit 2 are excepted from public disclosure under section 552.103(a). Section 552.103(a) reads as follows:

¹Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding), 549 at 6 (1990) (governmental body may waive informer’s privileged), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute “other law” that makes information confidential.

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

Gov't Code § 552.103(a). A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.–Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.–Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 588 (1991). Further, litigation must be pending or reasonably anticipated on the date the requestor applies to the public information officer for access. Gov't Code § 552.103(c).

You explain that the city is currently involved in litigation now pending before the United States Department of Transportation, Federal Aviation Administration (the "FAA"). This office has determined that an administrative agency's contested cases conducted under the Administrative Procedure Act, Government Code 2001, constitutes "litigation" for the purposes of section 552.103 of the Government Code. Open Records Decision Nos. 558 (1991), 301 at 2 (1982). Part 16 of Title 14 of the Code of Federal Regulations delineates the procedures of a hearing before the FAA. Under section 16.202 of Title 14 of the Code of Federal Regulations, a hearing officer has the authority to "issue subpoenas authorized by law and issue notices of deposition requested by the parties"; "limit the frequency and extent of discovery"; "rule on offers of proof"; "receive relevant and material evidence"; and "make findings of fact and conclusions of law, and issue an initial decision." See 14 C.F.R. § 16.202(c), (d), (e), (f), (k).

The hearing officer shall issue an initial decision based on the record developed during the proceeding and send this decision to the parties. See 14 C.F.R. § 16.241(a). Each party adversely affected by the initial decision may appeal the decision to the Associate Administrator. See *id.* § 16.241(b). If an appeal is filed, the Associate Administrator reviews the entire record and issues a final agency decision. See *id.* § 16.241(c). The Associate Administrator may also review the case on his or her own motion. *Id.* If no appeal is filed and the Associate Administrator does not review the initial decision on his or her own motion, the initial decision will take effect as the final agency decision. See *id.* § 16.241(d). A party's failure to file an appeal is deemed a waiver of that party's right to seek judicial review of the initial decision. See *id.* § 16.241(e).

Pursuant to section 16.247, a person may seek judicial review of the Associate Administrator's final decision or order in a United States Court of Appeals. *See* 14 C.F.R. § 16.247(a). A party may not seek judicial review following an initial decision issued by a hearing officer at the hearing's conclusion. *See id.* § 16.247(b)(3). Moreover, an initial decision by a hearing officer that becomes a final decision because it was not appealed to the Associate Administrator in the applicable time periods is not subject to judicial review. Thus, the FAA hearing serves as the forum for resolving the controversy on the basis of evidence. After reviewing these statutes, this office concludes that a hearing before the FAA that is conducted under Part 16 of Title 14 of the Code of Federal Regulations constitutes litigation for the purposes of section 552.103(a) of the Government Code. Therefore, the first prong of the test has been met.

Next, we must determine if the submitted documents relate to the pending litigation in order to be excepted from public disclosure. After reviewing the submitted documents, this office concludes that Exhibit 2 contains documents that relate to the pending litigation. We have marked the documents that we find relate to the pending litigation. Therefore, these marked documents are excepted from public disclosure under section 552.103(a).

However, we note that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information and such information must be disclosed. Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). We have marked documents contained in Exhibit 2 that we conclude the opposing party has had access to and therefore a section 552.103(a) interest does not exist in regard to these documents. Therefore, these documents must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

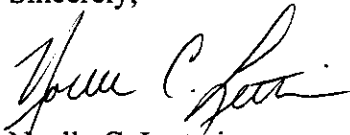
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.–Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Noelle C. Letteri
Assistant Attorney General
Open Records Division

NCL/nc

Ref: ID# 134413

Encl Submitted documents

cc: Mr. R. Gary Stephens
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(w/o enclosures)